Supreme Court, U.S.
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No. 95-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

Joan Carstensen,

Petitioner,

v.

Brunswick Corp., Mercury Marine Corp., and Sea Ray Boats, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Eighth Circuit held that the Federal Boat Safety Act of 1971 preempts a common law claim that a boat was defective because it lacked a propeller guard, even though there is no federal regulation in effect relating to propeller guards on boats. This decision was issued prior to this Court's ruling in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995) ("*Myrick*"), which held that there could be no preemption of a common law claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks where there was no federal regulation in effect relating to antilock brakes in trucks. The questions presented are:

1. Where the decision below found a state common law claim to be preempted solely because the federal government decided *not* to issue a regulation with respect to the product at issue, should the Court summarily reverse, or vacate and remand for reconsideration, in light of the ruling in *Myrick* that federal regulatory inaction does not have preemptive effect?

2. Does the Boat Safety Act preempt a common law claim that a boat was defective because it lacked a propeller guard where: (1) the federal regulatory agency has not adopted any particular standard or regulation with respect to propeller guards; (2) the Boat Safety Act's express preemption provision only applies where there has been "a [federal] regulation prescribed under section 4302 of [the Act]"; and (3) the Boat Safety Act's express savings clause provides that compliance with any such regulation "does not relieve a person from liability at common law or under State law"?

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eighth Circuit (App. 1-7) is reported at 49 F.3d 430 (8th Cir. 1995). The opinion of the district court (App. 8-11) was entered on July 14, 1994.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

The express "preemption clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4306 (1988), reads as follows:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

The express "savings clause" of the Federal Boat Safety Act of 1971, 46 U.S.C. § 4311(g) (1988), reads as follows:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

STATEMENT OF THE CASE

This case presents the question of whether a claim that a boat engine was defective because it lacks a propeller guard is preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (1988 & Supp. V. 1993) ("Boat Safety Act" or "Act"), and by a decision by the United States Coast Guard *not* to issue regulations requiring the use of propeller guards on all motor boats. The Eighth Circuit held that such claims are expressly preempted by the Act, even though: (1) there is no federal regulation or standard relating to propeller guards; (2) the Boat Safety Act's preemption provision only applies where there has been "a [federal] regulation prescribed under section 4302 of [the Act]," 46 U.S.C. § 4306; and (3) the Boat Safety Act's savings clause provides that compliance with any such regulations issued thereunder "does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). That decision, which is in direct conflict with this Court's ruling in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), and with the Texas Supreme Court's holding in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), is the subject of this petition.

A. The Federal Statutory and Regulatory Framework

1. The Boat Safety Act

The Boat Safety Act was enacted to "improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public through compliance with safety standards to be promulgated by the Secretary of the Department in

which the Coast Guard is operating -- presently the Secretary of Transportation." S. Rep. No. 248, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, 1333. The Act provides that the Secretary of Transportation "may prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment . . .." 46 U.S.C. § 4302(a)(1) (1988). This rulemaking authority has been transferred to the Commandant of the United States Coast Guard. *See* H.R. Rep. No. 338, 98th Cong., 1st Sess. 122-23 (1983), *reprinted in* 1983 U.S.C.C.A.N. 924, 934-35; H.R. Rep. No. 154, 100th Cong., 2d Sess. 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2361, 2363. The National Boating Safety Advisory Committee ("NBSAC") is charged with assisting the Coast Guard in evaluating the need for safety regulations. 46 U.S.C. § 4302(c)(4) (1988).

The Boat Safety Act contains two provisions addressing the effect of Coast Guard regulations on state law. First, Congress included in the legislation an express preemption clause providing, *inter alia*, that:

> a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard . . . that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306. Second, Congress included an express *anti*-preemption provision, or "savings clause," that expressly *preserves* all common law claims. It provides:

> [c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

46 U.S.C. § 4311(g).

This savings clause is found in the "Penalties and Injunctions" section of the Act, which also outlines criminal and civil penalties to which violators of the Boat Safety Act may be subject. *See* 46 U.S.C. § 4311(a)-(g) (1988 & Supp. V 1993). Under this section, a person or corporation found to be in violation of the Act may be either criminally liable or "liable to the Government" for a civil penalty. *Id.* § 4311(b) (1988). The savings clause provides that, if a person or corporation is in compliance with the Act, he will not be held liable to the Government, but is still subject to liability "at common law or under State law." *Id.* § 4311(g).

According to the Boat Safety Act's legislative history, the savings clause was

> intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. *The purpose of this section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability.* Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S. Rep. No. 248, 92d Cong., 1st Sess., sec. 40 (1971), *reprinted in* 1971 U.S.C.C.A.N. at 1352 (emphasis added).

Together, the preemption provision and the savings clause govern the preemptive effect of federal regulations issued pursuant to the Boat Safety Act.

2. The Coast Guard's Decision Not To Regulate Propeller Guards

In recent years, public attention has become increasingly focused on motor-boat propellers "as instruments of devastation that are injuring and killing large numbers of people." Jon S. Vernick and Associates, *Motorboat Propeller Injuries*, published by the Johns Hopkins University Injury Prevention Center and the Institute for Injury Reduction (Sept. 1992), at 1 [R. 270].[1] Propeller-related injuries "are often characterized by massive trauma, including significant blood loss or death." *Id.* at i [R. 266]. Between 1976 and 1990, the Coast Guard officially reported 175 fatalities and 1,438 non-fatal injuries in its *Boating Statistics* category "struck by boat of propeller" -- an average of approximately 100 per year. *Id.*[2]

The injuries associated with unguarded boat propellers have given rise to numerous lawsuits against marine engine manufacturers since the 1970s. *Id.* at 31 [R. 300]. However, despite this litigation, as of 1992 no major marine engine manufacturer had equipped any of its boats with any type of propeller guard to protect people in the water. *Id.*

The growing public controversy over the use of propeller guards led the Coast Guard to consider whether to begin the process of developing a proposed federal regulation mandating their use on passenger boats. As explained above, the Coast Guard has the authority to "prescribe regulations establishing minimum safety standards" for recreational boats. 46 U.S.C. §

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[1] Citations to "R." are to the record below.

[2] It has been estimated that "these data represent substantial and systematic underreporting" of injuries from boat propellers. *Id.*

4302(a)(1).[3] Despite this authority, the agency ultimately declined to begin the formal rulemaking process or draft any proposed regulation with respect to propeller guards. Instead, as explained below, the Coast Guard decided not to commence rulemaking on the basis of internal deliberations that led it to conclude that a nationwide standard mandating propeller guards for passenger boats was not warranted at that time.

The process began in 1988, when, at the Coast Guard's request, a subcommittee of the NBSAC (the "Subcommittee") was formed to investigate the feasibility of requiring guards to prevent underwater propeller accidents. *See Report of the Propeller Guard Subcommittee of the National Boating Safety Advisory Council*, presented November 7, 1989 at 30 [R. 29].

The Subcommittee ultimately recommended that the Coast Guard should take no regulatory action to require propeller guards. *Id.* at 24 [R. 53]. Although the Subcommittee recognized the hazards presented by unguarded boat propellers, it found that "[n]o simple universal design suitable for all boats and motors in existence has been described or demonstrated to be technologically or economically feasible. To retrofit the some 10 to 15,000,000 existing boats would thus require a vast number of guard models at prohibitive cost." *Id.* at 22 [R. 51]. *See also id.* at 24 [R. 53].

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[3] The process for "prescribing regulations" is set forth in the Administrative Procedure Act ("APA"), which contains numerous provisions to ensure that the public is given an opportunity to participate in the rulemaking process and is notified of its results. Specifically, the APA requires an agency to (1) publish "notice of proposed rulemaking in the Federal Register"; (2) give "interested parties an opportunity to participate in the rule making through submission of written data, views, or arguments . . . "; and (3) publish any "substantive rule . . . not less than 30 days before its effective date. . ." 5 U.S.C. § 553 (1994). The APA further requires that the agency "separately state and currently publish in the Federal Register" all "substantive rules of general applicability," as well as "statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D) (1994).

("there are no indications that there is a generic or universal solution currently available or foreseeable in the future.") Thus, the Subcommittee concluded that a regulation mandating the use of propeller guards on all boats was not warranted at that time.[4]

The NBSAC subsequently adopted the Subcommittee's recommendation that the Coast Guard not issue regulations regarding the use of propeller guards on recreational boats. App. 3. *See also Minutes of the 44th Meeting of the National Boating Safety Advisory Council*, Las Palmas Inn, International Drive, Orlando, Florida (Nov. 6-7, 1989) [R. 85]. However, in response to a presentation by a propeller strike victim that the search for new technology should continue, the NBSAC's Chairman "assured the Council and guests that this is not a dead issue. If new pertinent information becomes available, a subcommittee will be reconvened." *Id.* at 19 [R. 103].

On February 1, 1990, the Coast Guard adopted the NBSAC's recommendation that it not issue regulations mandating the use of propeller guards. App. 12-16 (Letter from Robert T. Nelsen, Rear Admiral, U.S Coast Guard, to Mr. A. Newell Garden, Chairman, National Boating Safety Advisory Council (Feb. 1, 1990) ("Coast Guard Letter")). The Coast Guard Letter reiterated the concern that there was no universal solution currently available to solve the propeller guard problem:

> The regulatory process is very structured and stringent regarding justification. Available

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[4] In its report, the Subcommittee discussed the fact that "[a] number of lawsuits have been filed by victims of alleged propeller strikes to recover damages from the operator of the striking vessel and also against the manufacturer of the propulsion unit and/or boat." *Id.* at 4 [R. 33]. The Subcommittee went on to note that, if the Coast Guard were to adopt a regulation mandating propeller guards, "[s]uch mandate would . . . establish prima facie manufacturer liability in having failed to provide them." *Id.* at 5 [R. 34]. It said nothing about what effect, if any, a decision *not* to issue a regulation would have on those lawsuits.

> propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

App. 12. The Coast Guard Letter added, however, that the agency would

> continue to collect and analyze accident data for changes and trends; and will promote increased/improved accident reporting . . . The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art.

App. 13. At no point did the Coast Guard Letter indicate that the agency intended to ban state regulation with respect to propeller guards, or to preempt common law claims relating to a manufacturer's failure to install propeller guards in its boats.

The Coast Guard's decision not to regulate propeller guards was not the product of any formal rulemaking proceeding and did not result in any regulatory action. The Coast Guard Letter, which sets forth the agency's decision not to regulate, was not exposed to public notice and comment and it was never published in the *Federal Register*. Thus, there was no attempt to conform to the notice-and-comment rulemaking requirements of the APA. *See* n.3, *supra*. To date, there is still no federal regulation with respect to propeller guards, and their use is neither mandated nor prohibited by federal law.

B. The Proceedings Below

On June 19, 1989, petitioner Joan Carstensen fell out of a small passenger boat powered by an outboard engine designed, manufactured, and sold by respondents Brunswick Corp., Mercury Marine Corp., and Sea Ray Boats, Inc.[5] Immediately after her fall, she was struck by the unguarded propeller of the boat's engine, causing serious injuries to her pelvis.[6] She filed suit in the United States District Court for the District of Nebraska, alleging that respondents were liable for negligence, strict liability, and breach of implied warranties for failure to equip the boat's engine with a propeller guard.

Respondents moved for summary judgment on the ground that Ms. Carstensen's claims were preempted by the Boat Safety Act, or, in the alternative, that the unguarded propeller was not defective as a matter of law. On July 14, 1994, the District Court granted respondents' motion on the sole ground that petitioner's claims were preempted by the Coast Guard's decision not to issue regulations requiring propeller guards on passenger boats. App. 13.

On appeal, the Eighth Circuit affirmed. The Court ruled that, although there are no federal regulations relating to the use of propeller guards, the Coast Guard's decision not to issue regulations requiring the use of propeller guards "has the same preemptive force as a decision to regulate." App. 3.

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[5] The boat was manufactured by Sea Ray Boats, with an engine and propeller supplied by Mercury Marine. Sea Ray Boats and Mercury Marine are subsidiaries of the Brunswick Corp. App. 2.

[6] The complaint alleges that petitioner suffered, *inter alia*, a "traumatic right hemipelvectomy, permanent disfigurement and disability, physical and mental pain in the past and into the future . . ." and medical expenses of approximately $100,000. Complaint ¶ 9 [R. 9].

The Eighth Circuit went on to hold that petitioner's claims were expressly preempted by the Boat Safety Act. App. 4. Although the Court recognized that the Act's express preemption clause does not mention common law claims, it reasoned that the statutory language "is very broad" and "'suggests no distinction between positive enactments and common law.'" App. 4 (quoting *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992)). As for the Boat Safety Act's savings clause, which expressly provides that compliance with federal regulations "does *not* relieve a person from liability at common law or under State law," 46 U.S.C. § 4311(g) (emphasis added), the Court concluded that the savings clause "should be read as saving only those common law claims that are not expressly preempted." App. 5. Such an interpretation, in the Eighth Circuit's view, was necessary to avoid "subvert[ing]" Congress' goal of "establishing uniform boat safety requirements." App. 5 (footnote omitted).

In so ruling, the Eighth Circuit explicitly rejected a contrary decision of the Texas Supreme Court in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), which held that the Boat Safety Act does not preempt a common law claim that a boat is defective because it lacks a propeller guard. The Court provided no rationale for its refusal to follow *Moore*, other than to state that it found the arguments in favor of preemption to be "more persuasive." App. 6.

As a result of the Eighth Circuit's holding, petitioner and other similarly situated accident victims have been stripped of any means of obtaining compensation for their injuries. *See Moore*, 889 S.W.2d at 251 (Boat Safety Act does not provide compensatory remedies for boat accident victims). Moreover, under the Eighth Circuit's holding, no State is permitted to issue any regulation or take any action to protect its citizens from injuries caused by underwater boat propellers. In the words of the Texas Supreme Court in *Moore*, the State of Nebraska now has no way to protect its "decided interest in providing compensation and

relief for its citizens who are injured on its waterways." *Id.*

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Conclusion that a Decision Not to Regulate Has the Same Preemptive Force as a Decision to Regulate is Directly Contrary to *Freightliner Corp. v. Myrick* and Other Decisions of this Court.

The first reason the writ should be granted is because the Eighth Circuit's holding that the Coast Guard's decision *not* to regulate has preemptive force directly conflicts with the recent holding in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995) ("*Myrick*"), as well as with other decisions of this Court. In light of *Myrick*, which was decided shortly *after* the decision below and specifically held that regulatory inaction does *not* have preemptive force, summary reversal is appropriate. Alternatively, the Court should grant the writ and remand this case for further consideration in light of *Myrick*.

Myrick is dispositive of petitioner's claim because that decision made clear that the mere absence of federal regulation with respect to a particular product has no preemptive effect whatsoever. In *Myrick*, this Court considered whether a claim that a manufacturer was negligent for failing to install antilock brakes in tractor-trailer trucks was preempted by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1982), and by a federal motor vehicle safety regulation governing airbrake systems in buses, trucks, and trailers. 49 C.F.R. § 571.121 (S3) (1993) ("Standard 121").

As originally promulgated in 1974, Standard 121 required that all truck manufacturers install antilock brakes. This requirement was invalidated by the Ninth Circuit's decision in *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 640 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978), which held that, although the

braking performance of some trucks was improved by antilock brakes, "critical problems began with mass production of vehicles designed to meet the Standard." *Id.* at 641. Due to the unforeseen manufacturing difficulties encountered during mass production of antilock systems, the Ninth Circuit ordered NHTSA to suspend the antilock requirements of Standard 121. *Id.* at 643. In response, NHTSA added language to the regulation stating that the antilock brake provisions invalidated by the *Paccar* ruling "are not applicable to trucks and trailers." 49 C.F.R. § 571.121(S3).

In *Myrick*, the truck manufacturers argued that Standard 121 preempted common law claims that their trucks were defective because they lacked antilock brakes. This Court disagreed, holding that there could be no preemption because there was no federal standard in place regarding antilock brakes in trucks:

> [t]here is no express federal standard addressing [antilock brakes] for trucks or trailers. No . . . regulation currently establishes a "minimum standard for . . . motor vehicle equipment performance," § 1391(2), nor is any standard "stated in objective terms," § 1392(a). There is simply no minimum, objective standard stated at all. Therefore, States remain free to "establish, or to continue in effect," their own safety standards concerning those "aspect[s] of performance." § 1392(d).

115 S. Ct. at 1487. In so holding, *Myrick* explicitly rejected the truck manufacturers' claim "that the absence of regulation itself constitutes regulation." *Id.* Mere regulatory inaction, said the Court, carries no preemptive force whatsoever, especially where "there is no evidence that [the federal agency] decided that [the product] should be free from all state regulation . . .." *Id.*

Myrick is squarely at odds with the decision below. In finding federal preemption of petitioner's "no-propeller guard"

claim, the Eighth Circuit embraced the very proposition that was subsequently rejected in *Myrick*: that an agency's "decision not to regulate has the same preemptive force as a decision to regulate." App. 3 (citations omitted). This ruling has the perverse effect of transforming a federal decision *not* to require propeller guards on motor boats into an affirmative decision to *ban* any state regulation requiring propeller guards on any motor boats, as well as any state common law claim simply requiring a manufacturer to pay damages for failing to include a specific propeller guard on a specific boat. Not only is this conclusion contrary to *Myrick*, but it flies in the face of numerous prior decisions of this Court holding that mere federal regulatory inaction, without more, does not imply an authoritative federal determination that the area is best left unregulated. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 496, 503-04 (1988) (federal inaction alone does not have preemptive effect); *Arkansas Elec. Co-Op v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (regulatory inaction only has preemptive force where Congress has made clear that its intention is "to fill a regulatory gap, not to perpetuate one.") (footnote omitted); *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971) (regulatory inaction has preemptive force in case "where [the agency's] federal power preempts the field.")[7]

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[7] *Puerto Rico*, 485 U.S. 496, is particularly instructive. There, gasoline refineries claimed that a regulation empowering the Secretary of Puerto Rico Department of Consumer Affairs to fix gasoline prices was preempted by the fact that Congress had passed, and subsequently repealed, comprehensive federal statutes providing for allocation and price controls on petroleum products. This Court rejected that claim, stating that Congress' decision to decontrol gasoline pricing did not, in and of itself, mean that a "free market was mandated by federal law." 485 U.S. at 501. To the contrary, the Court stressed that "a 'clear and manifest purpose' of pre-emption is always required." *Id.* at 503. The Court added that "[t]here is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it. When a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn – not from federal inaction alone, but from inaction joined with action." *Id.* (emphasis in original). The Court

The Eighth Circuit also ignored the fact that, as in *Myrick*, "there is no evidence that [the federal agency] decided that [the product at issue] should be free from all state regulation . . .." 115 S. Ct. at 1487. To the contrary, the record gives no indication that the Coast Guard ever intended its action to have any effect on state power. As explained *supra* at 7-8, the Coast Guard's decision not to mandate propeller guards stemmed from its "many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation." App. 12. Due to the lack of a "universally acceptable" solution, the Coast Guard declined to issue a nationwide standard for propeller guards. *Id.* The agency never stated, however, that there was *no* technology appropriate for use in *any* mode of boat operation; rather, the Coast Guard found that there was no technology appropriate for a national, *across-the-board* regulation applicable to *all* types of boats. Contrary to the Eighth Circuit's apparent reasoning, this determination would be entirely consistent with a state's decision to mandate the use of a certain type of propeller guard on specific boats or on boats used for a particular purpose.

There is also no evidence that the Coast Guard intended to restrict the ability of victims of propeller accidents to seek compensation through the common law tort system. To the contrary, the record demonstrates that the Coast Guard was well aware of the on-going litigation regarding propeller guards (*see supra* n.4), yet the agency said nothing to suggest that it intended to preempt such actions in the future. As the Texas Supreme Court found in *Moore, supra,* the Propeller Subcommittee report that was the basis for the Coast Guard's decision not to regulate propeller guards "mentions that manufacturers have been sued for not installing propeller guards, and recognizes that a federal requirement of propeller guards would establish a prima facie case

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concluded that "repeal of [the federal regulatory scheme] did not leave behind a pre-emptive grin without a statutory cat." *Id.* at 504.

of manufacturer liability in some states . . . Thus even if the Coast Guard made a policy determination, carrying preemptive weight, that propeller guards should not be regulated, its preemptive effect would not necessarily include common law." 889 S.W.2d at 252.

The absence of any preemptive intent on the part of the Coast Guard is dramatically underscored by the manner in which its decision was rendered. Under the Boat Safety Act, the Coast Guard is directed to "*prescribe regulations* . . . establishing minimum safety standards . . .." 46 U.S.C. § 4302(a)(1) (emphasis added). In keeping with this directive, Congress clearly intended that only properly promulgated regulations would exert preemptive force under the Act. In this case, however, there was no rulemaking proceeding of any sort, let alone a federal regulation proclaiming the Coast Guard's intention to ban state regulation of propeller guards. Instead, the agency's decision not to regulate was the product of internal deliberations (as opposed to the notice-and-comment rulemaking procedures mandated by the APA[8]), and was embodied in a letter written to the Chairperson of the Coast Guard's own Advisory Council informing him of the agency's decision not to regulate propeller guards. App. 12-16. Not only did the Coast Guard forego rulemaking on this subject, but it declined even to *publish* its informal decision not to commence rulemaking. This is hardly the type of "clear and manifest" expression of preemptive purpose that must be evident before preemption may be found. *Puerto Rico*, 485 U.S. at 503.

At bottom, the Coast Guard's decision not to regulate propeller guards is markedly similar to the fate of antilock brake regulation described in *Myrick*. In both cases, the absence of regulation was due to a determination that the current state of technology did not warrant a universal regulatory solution to a safety problem. In *Myrick*, that decision was made by the Ninth Circuit and then memorialized in the amendment to Standard 121

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[8] *See* n.3, *supra* (describing rulemaking procedures mandated by the APA).

eliminating the antilock brake requirement for trucks and trailers; in this case, the decision not to regulate was made by the agency in the first instance. But the result in both instances was the same: an absence of any federal regulation mandating *or* prohibiting the use of the technology in question. *Myrick* makes clear that federal preemption simply does not exist under these circumstances.

The Eighth Circuit's decision, moreover, has implications far beyond the narrow issue of preemption under the Boat Safety Act. If the decision below is permitted to stand, it could massively broaden the scope of federal preemption far beyond what Congress ever intended. Under the Eighth Circuit's reasoning, *any* federal decision not to regulate could be deemed to have preemptive force, regardless of the reason for federal inaction and regardless of the extent to which Congress made clear its intent *not* to intrude on states' regulatory power and/or strip individuals of their common law remedies. This approach turns the "strong presumption against pre-emption" on its head, *Cipollone,* 112 S. Ct. at 2621, creating, in its place, a powerful presumption in *favor* of federal preemption that arises simply by virtue of agency *in*action. Not only would this constitute a grievous blow against the traditional rights of victims to seek redress for injuries caused by dangerous products, but it would strip States of their historic power to protect the health and welfare of their citizens. Summary reversal is appropriate to prevent this deep encroachment on the rights of States to protect their citizens and of citizens to use the common law to protect themselves -- rights that neither Congress nor the Coast Guard ever expressed any intention to restrict.

II. There is a Direct and Irreconcilable Split Between the Eighth Circuit and the Texas Supreme Court as to Whether "No-Propeller Guard" Claims are Preempted by the Boat Safety Act.

The second reason the writ should be granted is that there is a clear split between the Eighth Circuit and the Texas Supreme

Court as to whether a common law claim that a manufacturer is liable for failing to equip its boats with propeller guards is preempted by the Boat Safety Act.

In *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), the Texas Supreme Court held that the Safety Act neither expressly nor impliedly preempts "no-propeller guard" claims. In its decision, the Court emphasized the strong presumption against federal preemption of state common law claims -- a presumption that "particularly obtains when, as in this case, state regulation of health and safety matters is involved." *Id.* at 249 (citing *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985)). In light of this strong presumption against preemption, the Texas Supreme Court rejected the boat manufacturers' claim that the reference to "law or regulation" in the Boat Safety Act's preemption provision encompasses -- and expressly preempts -- common law claims. *Id.* at 250.

The Court found support for this interpretation in the Act's savings clause, which explicitly *preserves* common law claims. *See* 46 U.S.C. § 4311(g) ("[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.") In the Texas Supreme Court's view, "[the savings clause] demonstrates not only that Congress knew how to explicitly refer to common law when it so desired, but also that Congress did not mean to preempt all state tort law actions under [the preemption provision]." 889 S.W.2d at 250.[9]

The Texas Supreme Court also rejected the boat

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[9] The Texas Supreme Court's interpretation of the Boat Safety Act's express preemption provision was further supported by the fact that "in other enactments Congress had explicitly referred to common law when it meant to include it within the scope of a preemption clause." *Id.* at 250 *4 (citations omitted).

manufacturers' argument that the plaintiff's "no-propeller guard" claim was impliedly preempted under the Safety Act. *Id.* at 251. On this point, the defendants argued that "a jury award in this case will conflict with and undermine the goals of the Act by creating a standard requiring propeller guards, in the face of the Coast Guard's determination that guards should not be mandated." *Id.* The Texas Supreme Court disagreed, stating, first, that the Coast Guard's decision not to regulate did not "reflect an intention to foreclose state tort liability." *Id.*

As to the boat manufacturers' claim that preemption must be implied because permitting "no-propeller guard" claims would undermine Congress' goal of creating uniform safety regulations, the Texas Supreme Court stated: "the savings clause reflects that Congress was willing to tolerate some tension between the concept that uniform safety regulations should be established at the federal level and the concept that a state may nevertheless award tort damages for unsafe products." *Id.* at 252. This approach makes sense, in the Texas Supreme Court's view, because "the regulatory effect of damage awards is not equivalent to that of positive enactments: a manufacturer who incurs tort liability for failing to install propeller guards has a choice not available to the regulated manufacturer -- installing guards on future boats or taking no action and bearing the liability as a cost of doing business." *Id.* at 251 (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988)). The Texas Supreme Court ultimately found no basis for finding express or implied preemption under the Boat Safety Act.

Less than one year later, the Eighth Circuit issued its decision rejecting virtually every aspect of the holding in *Moore*. *See* App. 1-7. First, whereas *Moore* held that the Coast Guard's decision not to require propeller guards did *not* reflect an intent to preempt state regulation in that area, the Eighth Circuit came to the opposite conclusion, holding that "[t]he decision not to regulate has the same preemptive force as a decision to regulate." App. 3. Notably, the Eighth Circuit did not even attempt to determine

whether the Coast Guard actually intended to preempt state law; rather, the Court simply assumed that the agency's regulatory inaction has preemptive force. *See id.*

Second, the Eighth Circuit unequivocally rejected *Moore*'s holding that the Boat Safety Act does not expressly preempt common law claims. With respect to the scope of the Act's preemption provision, the Court reasoned that, although "the preemption clause does not specifically refer to common law actions, . . . it is very broad." App. 4. As for the Act's savings clause -- which *does* contain a reference to common law claims -- the Eighth Circuit held that "[the savings clause] should be read as saving only those common law claims that are not expressly preempted." *Id.* Based on its reading of these two provisions, the Eighth Circuit concluded -- contrary to the Texas Supreme Court in *Moore* -- that petitioner's "no-propeller guard" claim was expressly preempted.

Thus, the decision below is squarely in conflict with the Texas Supreme Court's decision in *Moore*. The split is reflected in divergent lower court decisions regarding the scope of preemption under the Boat Safety Act. *Compare Ryan v. Mercury Marine*, No. 163473 (Mich. Ct. App. May 24, 1995) (common law "no-propeller guard" claim preempted under the Boat Safety Act); *Parker v. Outboard Motor Corp.*, No. J90-0011(L) (S.D. Miss. Feb. 25, 1993) (same); *Shield v. Bayliner*, 822 F. Supp. 81 (D. Conn. 1993) (same); *Farner v. Brunswick*, 239 Ill. App. 3d 885, 607 N.E.2d 562 (1992) (same); *Mowery v. Mercury-Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991) (same); *Shields v. Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991) (same); *with Eggen v. Griffith, et al.*, No. B-C-89-31 (E.D. Ark. May 28, 1991) (common-law "no-propeller guard" claim not preempted under the Boat Safety Act); *Mulhern v. Outboard Marine Corp.*, 146 Wis. 2d 604, 432 N.W.2d 130 (Wis. Ct. App. 1988) (common law claim that boat manufacturer was liable for defectively designed boat engine not preempted under the Boat Safety Act); *Rubin v. Brutus Corp.*, 487 So. 2d 360 (Fla. Dist. Ct.

App. 1986) (common law claim that boat manufacturer was liable for defectively designed boat seat not preempted under the Boat Safety Act).[10]

If this Court declines to summarily reverse or vacate and remand for reconsideration in light of *Myrick*, review is warranted to resolve this split, prevent further confusion among the lower courts, and ensure that state law claims which Congress intended to preserve are not preempted.

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[10] In *Carstensen*, the Eighth Circuit stated that *Moore* was the only decision finding no preemption under the Boat Safety Act, and attempted to distinguish *Mulhern* and *Rubin* on the ground that those cases involved "claims for defectively designed products that are actually installed . . .." App. 6. That distinction makes no sense. Like petitioner's claim in this case, both *Mulhern* and *Rubin* included defective design claims. The only difference is that, whereas this case involves a claim that a boat's design was defective because it *lacked* a certain part, *Mulhern* and *Rubin* involved claims that boats were defective because they *included* defectively designed parts. There is no logical reason for distinguishing between the two sorts of claims with respect to preemption, and the Eighth Circuit provided none.

CONCLUSION

The Court should grant this petition for a writ of *certiorari* and summarily reverse or vacate and remand for reconsideration in light of *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995). Alternatively, the Court should grant this petition to resolve the split between the Eighth Circuit and the Texas Supreme Court with respect to the question of whether common law "no-propeller guard" claims are preempted by the Boat Safety Act.

Respectfully submitted,

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Date: July 12, 1995

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2982

Joan Carstensen,	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Nebraska
Brunswick Corporation, Mercury Marine Corporation, and Sea Ray Boats, Inc.	*	
Appellees.	*	

Submitted: January 13, 1995

Filed: March 3, 1995

Before RICHARD S. ARNOLD, Chief Judge, ROSS, Senior Circuit Judge, and MURPHY, Circuit Judge.

MURPHY, Circuit Judge.

Joan Carstensen appeals the dismissal of her diversity action against the Brunswick Corporation, Mercury Marine Corporation, and Sea Ray Boats, Inc. to recover damages for injuries she

received when she fell out of a boat and was struck by the engine's propeller. Her complaint alleged that appellees failed to design, manufacture, or equip the boat and engine with a propeller guard.[1] The district court[2] held that Carstensen's state law tort claims were preempted by the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 (FBSA). We affirm.

Carstensen argues on appeal that the FBSA preemption clause, 46 U.S.C. § 4306, does not expressly preempt her common law claims and that its savings clause, 46 U.S.C. § 4311(g), specifically preserves them. Appellees respond that the statute expressly preempts common law damage actions and that its savings clause should not be interpreted to the contrary.

The FBSA expressly states the intent of Congress to preempt state laws or regulations that are not identical to a regulation promulgated under the act:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical

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[1]The boat had been manufactured by Sea Ray Boats, Inc. with an engine and propeller supplied by Mercury Marine. Sea Ray Boats, Inc. and Mercury Marine are subsidiaries of the Brunswick Corporation.

[2]The Honorable William G. Cambridge, United States District Judge for the District of Nebraska.

to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306.

Rulemaking authority under the FBSA related to recreational vessels has been delegated to the United States Coast Guard,[3] which has specifically rejected proposed regulations requiring the use of propeller guards. On February 1, 1990, the Coast Guard adopted the recommendation of the National Boating Safety Advisory Council that the "U.S. Coast Guard should take no regulatory action to require propeller guards,"[4] and the official position that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." Letter from Robert T. Nelson, Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation, Safety and Waterway Services to A. Newell Garden, Chairman, National Boating Safety Advisory Council 1 (Feb. 1, 1990).

The decision not to regulate has the same preemptive force as a decision to regulate. See Bonito Boats, Inc., v. Thunder Craft Boats, Inc., 489 U.S. 141, 151-52 (1989); Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board, 474 U.S. 409, 422 (1986); Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv.

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[3]The FBSA provides that the Secretary of Transportation "may prescribe regulations establishing minimum safety standards for recreational vessels and associated equipment . . ." 46 U.S.C. § 4302(a)(1). The Secretary may delegate his authority under the FBSA to "a person, private or public agency, or organization." 46 U.S.C. § 4303(a). Pursuant to § 4303(a), the Secretary of Transportation has delegated his powers and duties under the Act to the Commandant of the Coast Guard. H.R. No. 338, 98th Cong., 1st Sess. 122-23 (1983), reprinted in 1983 U.S.C.C.A.N. 924, 934-35; H.R. Rep. No. 154, 100th Cong, 2d Sess. 9 (1988), reprinted in 1988 U.S.C.C.A.N. 2361, 2363.

[4]Minutes of the 44th Meeting of the National Boating Safety Advisory Council 17-19 (Nov. 6-7, 1989).

Comm'n, 461 U.S. 375 (1983). Any state law or regulation requiring manufacturers to install propeller guards would not be identical to the Coast Guard regulatory position.

As Carstensen points out, the FBSA preemption clause does not specifically refer to common law actions, but it is very broad. The clause preempts any state "law or regulation . . . imposing a requirement for associated equipment . . . ." The broad language "suggests no distinction between positive enactments and common law." Cipollone v. Liggett Group, Inc., 505 U.S. __, __, 112 S. Ct. 2608, 2620 (1992). It is well established that "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" Id. (quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959)); National Bank of Commerce v. Kimberly-Clark Corp., 38 F.3d 988, 990 (8th Cir. 1994).

Allowing a jury to assess damages for failure to install a propeller guard would create, in effect, a state requirement that guards be installed. State damage actions based on such failure would establish a regulation "imposing a requirement for associated equipment" that is not identical to that prescribed by the Coast Guard. When Congress has drafted a specific preemption provision that "provides a 'reliable indicium of congressional intent with respect to state authority," the scope of preemption is defined by its express terms. Cipollone, 505 U.S. at __, 112 S. Ct. at 2618 (1992). We conclude that the preemption clause of the FBSA expressly preempts such claims.

Carstensen argues that the savings clause in the FBSA must alter the preemption analysis. The statute's "penalties and injunctions" section includes a clause which provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person

from liability at common law or under State law." 46 U.S.C. § 4311(g).

A savings clause should not be read to save those common law rights, "the continued existence of which would be absolutely inconsistent with the provisions of the act." Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907). A general remedies savings clause "cannot be allowed to supersede the specific substantive pre-emption provision." Morales v. Trans World Airlines, Inc., 504 U.S. __, __, 112 S. Ct. 2031, 2037 (1992) (finding common law claims to be preempted by the Airline Deregulation Act of 1978). Instead, interpretation of a savings clause "must be guided by the goals and policies of the Act." International Paper Co. v. Ouellette, 479 U.S. 481, 493 (1987) (Clean Water Act).

The preemption clause of the FBSA specifically provides that any state requirements that differ from the federal regulations are preempted. This is consistent with the statute's goal of establishing uniform boating safety requirements.[5] The general savings clause should not be interpreted to subvert this goal. Instead, it should be read as saving only those common law claims that are not expressly preempted. Such an interpretation does not render the savings clause superfluous.

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[5]The legislative history of the preemption clause explains that

> This section provides for federal preemption in the issuance of boat and equipment safety standards. This conforms to the long history of preemption in maritime safety matters and is founded on the need for uniformity applicable to vessels moving in interstate commerce. In this case it also assures that manufacture for the domestic trade will not involve compliance with widely varying local requirements.

S. Rep. No. 248, 92d Cong., 1st Sess., reprinted in 1971 U.S.C.C.A.N. 1333, 1341.

This stated purpose of the savings clause is "to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability." S. Rep. No. 248, 92d Cong., 1st Sess., reprinted in 1971 U.S.C.C.A.N. 1333, 1353. Not all common law claims have the effect of establishing a safety standard or requirement. For example, common law claims asserting liability for defectively designed products that are actually installed may not be preempted. See, e.g., Mulhern v. Outboard Marine Corp., 432 N.W.2d 130 (Wis. Ct. App. 1988) (claims based on defective throttle not preempted by FBSA); Rubin v. Brutus Corp., 487 So. 2d 360 (Fla. Dist. Ct. App. 1986) (claims based on defective seat not preempted by FBSA).

Our analysis in this case is consistent with that of other courts that have considered whether claims based on the failure to install propeller guards are preempted by the FBSA. See, e.g., Shield v. Bayliner Marine Corp., 822 F. Supp. 81 (D. Conn. 1993); Shield v. Outboard Marine Corp., 776 F. Supp. 1579 (M.D. Ga. 1991); Mowery v. Mercury Marine, 773 F. Supp. 1012 (N.D. Ohio 1991); Farner v. Brunswick Corp., 607 N.E.2d 562 (Ill. App. Ct. 1992). In Mowery, for example, the court concluded that a failure to install claim is "explicitly preempted by the FBSA" and that the "savings clause is inapplicable" in such cases. 773 F. Supp. at 1017. The rationale of this line of cases is more persuasive than that of the sole court that has held to the contrary. See Moore v. Brunswick Bowling & Billiards Corp., 889 S.W.2d 246 (Tex.), cert. denied, 115 U.S. 664 (1994).[6]

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[6]Carstensen also directs our attention to Myrick v. Freuhauf Corp., 13 F.3d 1516 (11th Cir.), cert. granted sub nom. Freightliner Corp. v. Myrick, __U.S. __, 115 S. Ct. 306 (1994), in which the Eleventh Circuit held that common law claims based on failure to install anti-lock brakes are not preempted by the National Traffic and Motor Vehicle Safety Act (NTMVSA). Myrick is not dispositive here because of the distinct difference between the language of the NTMVSA preemption and savings clauses and that of the

We conclude that Carstensen's state tort claims based on the failure to install a propeller guard are preempted by federal law and affirm their dismissal.
A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

FBSA. See id. at 1520.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOAN CARSTENSEN,	)	8:CV93-270
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	MEMORANDUM OPINION
BRUNSWICK	)	AND ORDER
CORPORATION,	)	
MERCURY MARINE	)	
CORPORATION,	)	
AND SEA RAY BOATS,	)	
INC.	)	
	)	
Defendants.	)	

THIS MATTER IS before the Court on the defendants' motions to dismiss or in the alternative for summary judgment and for oral argument, (filing no. 11), and for an extension of time to file a reply brief, (filing no. 18). The Court finds that the motion to dismiss should be granted, the motion for oral argument denied, and the motion for an extension of time to file a reply brief denied as moot.

The plaintiff, Joan Carstensen, was injured when she fell out of a boat and was struck by the engine's propeller. She alleges that the boat involved was manufactured by Sea Ray Boats, Inc. with the engine and propeller supplied by Mercury Marine. Mercury and Sea Ray are subsidiaries of Brunswick (hereinafter the defendants are collectively referred to as "Brunswick"). Carstensen bases her complaint on Brunswick's failure to design, manufacture, or equip the boat and engine with a propeller guard. Brunswick asserts that the claim should be dismissed because it is preempted by the Federal Boat Safety Act of 1971 ("FBSA"), 46 U.S.C. § 4306, or, in the alternative, the Court

should grant summary judgment because an unguarded propeller is not unreasonably dangerous as a matter of Nebraska law.

Congress has the power to preempt state law under the Supremacy Clause contained in the United States Constitution. U.S. Const. art IV, cl. 2; Cipollone v. Liggett Group, Inc., 505 U.S. __, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407, 422 (1992). The Court must examine Congressional intent to determine whether a claim is preempted. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299-300 (1988).

The FBSA contains a preemption clause that expressly states Congress' intent to prohibit states from promulgating recreational boating equipment safety standards that are not identical to those in the FBSA. The FBSA preemption clause provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

46 U.S.C. § 4306.

"The purpose of this provision 'is to standardize regulations applicable to the manufacture of boats by precluding states from adopting requirements that conflict with federal standards.'" Mowery Mercury Marine, Div. of Brunswick Corp., 773 F. Supp. 1012, 1014 (N.D. Ohio 1991) (quoting Rubin v. Brutus Corp., 487 So. 2d 360, 363 (Fla. Ct. App. 1986)). The Secretary of Transportation promulgates the national regulations

set out in the FBSA, 46 U.S.C. § 4302(a)(2), but the regulatory authority has been delegated to the United States Coast Guard. The Coast Guard declined to adopt regulations requiring the use of propeller guards. When federal officials do not exercise their full authority in such a manner so that it takes on a character that no regulation is appropriate or approved pursuant to the statute, a state cannot use its police power to enact such a regulation. Shields v. Outboard Marine Corp, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); Mowery, 773 F. Supp. at 1016. In addition, the purpose of the FBSA is to promote boating safety by standardizing regulations relating to the manufacture of boats. Shields, 776 F. Supp. at 1581. To allow a jury to decide the question of boat safety might result in a variety of regulations that would be inconsistent with the purpose of the FBSA.

The plaintiff argues that the savings clause contained in the FBSA allows her to assert her claims. The clause states that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). This provision has been interpreted to mean that a manufacturer cannot use compliance with the minimum safety standards in the FBSA as a defense against liability for defective products that are actually installed. Mowery, 773 F. Supp. at 1017.

The savings clause also indicates that the entire field of boat safety regulations is not occupied but that plaintiffs may assert state law claims based on state statutes or regulations which have not been displaced by the FBSA, i.e. rules which are identical to those in the FBSA and do not conflict with its objectives. Shields, 776 F. Supp. at 1582. Although there is room for concurrent federal and state regulation, it is only to the extent allowed by the federal government. The savings clause does not allow the plaintiff to assert her claim because it would be contrary to the non-requirement of propeller guards and to the

goal of uniform regulations. Id. For these reasons, the court finds that the savings clause does not apply to this case.

The court finds that the FBSA preempts the plaintiff's claims for failure to provide a propeller guard. The court must dismiss the claims because it is without subject matter jurisdiction over them.

IT IS ORDERED:

1. the defendants' motion to dismiss or in the alternative for summary judgment, (filing no. 11), is granted;

2. the defendants' motion for oral argument, (filing no. 11), is denied;

3. the defendants' motion for an extension of time to file a reply brief, (filing no. 18), is denied as moot; and,

4. this action is dismissed.

Dated this 14 day of July, 1994.

BY THE COURT:

/s/
William G. Cambridge
United States District Court

Department of Transportation
United States Coast Guard

Commandant
United States Coast Guard

Washington, D.C.
Staff Symbol: G-NAB
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16750
000117
Feb 1, 1990

Mr. A. Newell Garden
Chairman, National Boating
Safety Advisory Council
20 Hunter Street
West Newton, MA 02165

Dear Mr. Chairman:

We have completed our review of the "Report of the Propeller Guard Subcommittee" which was approved by NBSAC on 7 November 1989. All of the report's recommendations are accepted. The recommendations will be implemented within resource limitations as outlined below:

NBSAC Recommendation 1. The U.S. Coast Guard should take no regulatory action to require propeller guards.

Coast Guard Position. The regulatory process is very structured and stringent regarding justification. Available propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats. Regulatory action is also limited by the many questions about whether a universally acceptable propeller guard is available or technically feasible in all modes of boat operation. Additionally, the question of retrofitting millions of boats would certainly be a major economic consideration.

The Coast Guard will continue to collect and analyze accident data for changes and trends; and will promote increased/improved accident reporting as addressed in recommendation 2. The Coast Guard will also review and retain any information made available regarding development and testing of new propeller guarding devices or other information on the state of the art.

NBSAC Recommendation 2. The U.S. Coast Guard should, through improved accident reporting and analysis, develop a complete and comprehensive data base on underwater impact accidents. This should involve, as an integral part, U.S. Coast Guard involvement in the National Electronic Injury Surveillance System (NEISS) and the appropriate training of involved hospital personnel.

Coast Guard Position. There are several avenues to obtaining better accident data. The key is accident investigation. The Coast Guard has been promoting and assisting increased and improved state boating accident investigation for a number of years. Several Coast Guard initiatives have been applied including development of a comprehensive "Marine Accident Investigation Manual," an annual series of Boating Accident Investigation Seminars around the country, and installation of an accident investigation module at the Coast Guard's National Boating Safety Course for state personnel. The need for a closer look at boat and propeller strike accidents will be stressed in the training.

We intend to go beyond existing Coast Guard/state accident reporting channels. We have explored Coast Guard participation in the National Electronic Injury Surveillance Systems in the past and will take a renewed look at participation. Additionally, we are seeking proposals to improve accident reporting and analysis through our National Nonprofit Public Service Organization Grant Program. We are, for example, considering the use of

college students to gather hospital emergency room and clinic information on boating accidents.

NBSAC Recommendation 3. The U.S. Coast Guard should implement necessary steps to have included in national and state level educational and awareness campaigns the information regarding potential hazards associated with careless or negligent boat operation. Such programs should be on a continuing basis and be as vivid as possible in depicting underwater impact accident scenarios. These programs should state in a positive manner how such accidents can be prevented by diligent, informed boat operators.

Coast Guard Position. National educational campaigns have been aimed at the major causes and types of boating accidents and means of preventing and mitigating, e.g., need for education and PFD wear, drinking and boating problems, capsizing and falls overboard from small boats. More specific campaigns focused on hypothermia, problems associated with boat use for fishing and hunting, etc. While struck by boat and/or propeller accidents aren't among the major types of boating accidents, careless and negligent operation are major causes of boating accidents. Results and means of avoiding underwater impact accidents could effectively be interwoven into campaigns aimed at negligent operation. The Coast Guard will explore means and opportunities for doing and promoting this. A series of articles in our Boating Safety Circular will be developed aimed at avoiding boat/propeller strike accidents. Topics could include, for example, hazards, available propeller guards, warning labels, keeping people in the boat, avoiding bow and rail riding, avoiding swimming areas, etc.

NBSAC Recommendation 4. The U.S. Coast Guard should work with appropriate voluntary standards making organizations (such as ABYC and SAE) to develop meaningful warning labels, and define their most effective locations, concerning the hazards of underwater impacts.

Coast Guard Position. The Coast Guard is soliciting for project proposals to do this through our national Nonprofit Public Service Organization Grant Program. If this mechanism is unsuccessful, we will approach ABYC and SAE regarding including warning label development in their respective work programs.

NBSAC Recommendation 5. The U.S. Coast Guard should review manufacturing safety standards of watercraft, emphasizing the importance of keeping passengers and operators in the boat, and maintaining the unobstructed fore and aft view of the boat operator.

Coast Guard Position. Improvements may be difficult to address through the regulatory process because of the need for quantitative justification and the vast array of boat configurations. The Coast Guard will make industry more aware of the considerations of adequate operator visibility and designs to facilitate keeping persons in the boat. Voluntary standards and design guidelines may be the only alternative to address this recommendation in a structured fashion.

NBSAC Recommendation 6. The U.S. Coast Guard should encourage a systematic review of current enforcement programs aimed at reducing boat accidents, and should provide all possible support to implement, maintain and expand those programs targeting the prevention of accidents.

Coast Guard Position. Enforcement is a major component of a boating safety program. Initially, the Coast Guard will address this recommendation through guidance to and feedback from the states associated with the allocation and use of state financial assistance, also, the Coast Guard's National Boating Safety Course for state personnel. We will ask NASBLA to task its Law Enforcement/Uniform Boating Laws Committee with a review of enforcement programs.

Mr. Chairman, NBSAC members have handled this difficult and controversial task in an even-handed and professional manner. I want to commend you for your continuing leadership of the Council and the members of the propeller guard subcommittee for their fine work. Please pass my thanks to all the Council members for their work on behalf of safe boating.

Sincerely,

/s/
ROBERT T. NELSON
Rear Admiral, U.S. Coast Guard
Chief, Office of Navigation Safety
and Waterway Services

No. 95-120

Supreme Court, U.S.
FILED
AUG 30 1995
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In the Supreme Court of the United States

OCTOBER TERM, 1995

JOAN CARSTENSEN,

Petitioner,

v.

BRUNSWICK CORP., MERCURY MARINE CORP., AND SEA RAY BOATS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Federal Boat Safety Act of 1971 preempts a state common law requirement that all recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, determined that such a requirement would be contrary to the interests of boat safety.

RULE 29.1 STATEMENT

Respondent Brunswick Corporation has the following subsidiaries (other than wholly-owned subsidiaries): Doellwood Financial, Inc.; Enhanced Energy Systems, Inc.; Intellitec International Inc.; Jewon, Co., Ltd.; Juangxi Marine Company, Limited; Merc Spader, Inc.; Nippon Brunswick Kabushiki Kaisha; Nireco Corporation; Sugita Seisakusho Co., Ltd.; Texas Lounge Operations, Inc.; Texas Thousand Oaks, Inc.; Tohatsu Marine Corporation; and Wayne Recreation Center Lounge, Inc.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-120

JOAN CARSTENSEN,

Petitioner,

v.

BRUNSWICK CORP., MERCURY MARINE CORP., AND SEA RAY BOATS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioner urges this Court to grant certiorari and reverse summarily because of a purported conflict between the Eighth Circuit's decision in this case and the recent decision in *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483 (1995). There is in fact no conflict. This case involves a statutory and regulatory scheme — under the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 4301-4311 ("Boat Safety Act") — that is completely different from the motor vehicle safety regime at issue in *Myrick*. Petitioner offers no plausible reason why the Court should review this unexceptional decision, which follows a long line of federal and state court decisions finding federal preemption under the Boat Safety Act.

STATEMENT

A. The Boat Safety Act and Federal Preemption

The Boat Safety Act was enacted by Congress to "reduce the level of fatalities now resulting from boating mishaps" by establishing "a coordinated national boating safety program." S. Rep. No. 92-248, 92d Cong., 1st Sess. 1 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333 ("Senate Report"). The safety program created by the Boat Safety Act requires manufacturers to comply with "national construction and performance standards for boats and associated equipment" established by the United States Coast Guard.[1] *Id.* at 15; see 46 U.S.C. § 4302(a)(1) (authorizing "minimum safety standards for recreational vessels and associated equipment"). In considering whether to adopt a safety standard, the Coast Guard is required to "consult with" the National Boating Safety Advisory Council ("the NBSAC" or "Committee"), 46 U.S.C. § 4302(c)(4), a group of experts and other persons interested in boat safety established by the Act, 46 U.S.C. § 13110.[2]

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[1] The safety standards are "promulgated by the Secretary of the Department in which the Coast Guard is operating — presently the Secretary of Transportation." Senate Report at 6.

[2] The 21 members of the NBSAC, who are appointed by the Secretary of Transportation, must be individuals who have particular expertise, knowledge, and experience in recreational boating safety. 46 U.S.C. § 13110(a). The NBSAC members are selected from, and represent, three different constituencies: (a) seven state officials responsible for state boat safety programs; (b) seven representatives of recreational vessel manufacturers and associated equipment manufacturers; and (c) seven representatives of national recreational boating organizations and the general public. *Id.* at § 13110(b)(1).

Congress declared that the safety program established by the Boat Safety Act must be based on uniform national standards:

> The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level.

Senate Report at 14. To achieve national uniformity, and in deference to the "long history of preemption in maritime safety matters" (*id.* at 20), Congress included the following broad preemption provision in the Act (46 U.S.C. § 4306):

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

By mandating that state laws and regulations be "identical" to regulations issued by the Coast Guard, the preemption section of the Boat Safety Act insures that boat manufacturers need not be concerned about "compliance with widely varying local requirements." Senate Report at 20. The statute does allow the states some latitude to "impose requirements with respect to carrying or using marine safety articles which go beyond the federal requirements when necessary to meet uniquely hazardous local conditions or circumstances."

Ibid.[3] The preemption section reserves to the Coast Guard, however, a "right of disapproval" over these state requirements "to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity." *Ibid.*

The Boat Safety Act also includes a so-called "savings" clause, which provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g). The Senate Report on the Act states (at 32) that the "purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability."

B. The Coast Guard's Decision Not to Require Propeller Guards

In 1988, the Coast Guard requested the NBSAC to consider whether propeller guards should be required on recreational vessels. The Coast Guard's charge to the Committee asked it to:

* Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water.

* Assess the arguments for and against some form or mechanical guard to protect against propeller strikes reflecting the positions of state boating law administra-

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[3] The Boat Safety Act also "does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern." Senate Report at 20.

tors, the recreational boating industry, and the boating public.

National Boating Safety Advisory Council, *Report of the Propeller Guard Subcommittee* ("Subcommittee Report") App. A (R. 57).[4] In particular, the Coast Guard asked the Committee whether there should be "a federal requirement for some form of propeller guard." *Ibid.*

In response to the Coast Guard's request, the NBSAC established a special five-person Propeller Guard Subcommittee to consider the issue after gathering information from a wide range of public and private sources. *Id.* at 1 (R. 30). The Subcommittee received and reviewed files and information supplied by the Coast Guard. *Ibid.* In addition, the Subcommittee solicited and reviewed "files, data, case histories and other information" from diverse individuals and organizations interested in boat safety, *ibid.*; *id.* at Apps. B-C (R. 59-67), including representatives of boat manufacturers and counsel representing injured persons in product liability actions. *Id.* at 3-4 (R. 32-33).[5]

During its extensive fact-finding activities conducted over more than a year, the Subcommittee held public meetings across the country, providing interested persons and organizations the opportunity to present testimony on whether propeller guards should be required by the Coast Guard. *Id.* at

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[4] "R." refers to the Joint Appendix filed in the court of appeals.

[5] At least six of the 24 individuals contacted by the Subcommittee were either attorneys or expert witnesses retained by plaintiffs in product liability litigation to advocate the use of propeller guards. Subcommittee Report at App. B (R. 59-61). Indeed, one of the lawyers representing the petitioner in this case, R. Ben Hogan, III, was contacted by the Subcommittee and made written and oral presentations to the Subcommittee. *Id.* at App. B, 2 (R. 60), App. C (R. 63-67), App. D. (R. 69-70)

App. D (R. 69-71). In its comprehensive review, the Subcommittee examined "[v]arious types of propeller guards, both commercially available and experimental, underwater motor housing appendages and other relevant materials," and operated boats equipped with and without guards. *Id.* at 2 (R. 31).

Evidence produced to the Subcommittee indicated that "boating fatalities involving the propeller" number "approximately 30-49 * * * per year." *Id.* at App. E, 1-2 (R. 73-74). "On an absolute basis this is one third to one half the number of fatalities associated with being struck by lightning." *Id.* at App. E, 2 (R. 74). Indeed, in light of the large number of people who use recreational vessels each year (the "boat population" of the United States exceeded 17 million in 1988, *id.* at 9 (R. 38)), the number of propeller incidents is small compared to the total number of boating accidents. *Id.* at 10 (R. 39), App. E (R. 76); see *id.* at 23 (R. 52) ("the propeller itself is the sole factor only in a minority of impacts").[6]

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[6] Petitioner cites (Pet. 5) a study on propeller-strike incidents, *Motorboat Propeller Injuries*, published in part by a plaintiffs' advocacy group (the Institute for Injury Reduction), that was not a part of the record established by the NBSAC. Moreover, petitioner overstates the number of fatalities and injuries caused by propeller accidents in citing the Coast Guard's "*Boating Statistic* category 'struck by boat of [*sic*] propeller.'" Pet. 5. The category is actually "struck by boat *or* propeller." Subcommittee Report at App. E, 1 (R. 73) (emphasis added); see also *id.* at 5 (R. 34) (noting that manufacturers have shown that a "very high percentage of the reported accidents of 'struck by boat or propeller' do not involve propeller strikes, but involve impacts with the boat hull or a stationary component of the lower unit"). The evidence produced to the Propeller Guard Subcommittee indicated that approximately 49 fatalities per year are grouped in this category, but that "[e]stimates show that boating fatalities involving the propeller are probably closer to 30 per year." *Id.* at 1 (R. 73).

After its extensive fact-finding was completed, the Subcommittee unanimously adopted a lengthy Report, which concluded that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." *Id.* at 24 (R. 53). Among the significant safety concerns supporting this recommendation were the lack of a feasible propeller guard for any pleasure craft traveling at normal operating speeds, serious steering and handling problems caused by propeller guards (along with increased drag and loss of speed), and safety problems concerning underwater impacts by propeller guards. *Id.* at 12-17 (R. 41-46), 20-21 (R. 49-50).[7]

In light of these substantial adverse safety consequences, the Report concluded that "[t]he development and use of devices such as 'propeller guards' can, therefore, be counter-productive and can create new hazards of equal or greater consequence." *Id.* at 23 (R. 52). *In short, propeller guards*

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[7] "After considering the available data on propeller strike accidents [and] the testimony of numerous experts, the subcommittee determined that propeller guards are not feasible for recreational boats because they decrease an operator's ability to maintain control over the boat at 'normal' speeds, *increase* the probability of striking a body in the water, and create a possibility of causing greater injury to those struck." *Mowery* v. *Mercury Marine, Division of Brunswick Corp.*, 773 F. Supp. 1012, 1016 (N.D. Ohio 1991) (emphasis in original).

In addition, while propellers "present the hazard of cutting wounds and penetration of the body," propeller "guards (which increase significantly the potential impact area) present the additional hazard of blunt trauma injuries, which are often more severe." Subcommittee Report at 18-19 (R. 47-48). For example, "a skull impact at 10 mph or more in the water would be generally fatal." *Id.* at 17 (R. 46).

The Subcommittee Report also noted that so-called "ring-type guards" create "a new hazard" of arms and legs being "caught by the bars or rings and held against the rotating propeller." *Id.* at 20-21 (R. 49-50).

would make boats less safe.[8] As a consequence, the Subcommittee recommended that the Coast Guard not require propeller guards and cautioned that the "boating public must not be misled into thinking there is a 'safe' device which would eliminate or significantly reduce * * * injuries or fatalities." *Id.* at 24 (R. 53).

The full NBSAC considered the Subcommittee's Report at its meeting in November 1989. See *Minutes of the 44th Meeting of the National Boating Safety Advisory Council* at 17-19 (Nov. 6-7, 1989) (R. 101-103). All 21 members of the Committee, representing state governments, boat manufacturers, and the interested public (see note 2, *supra)*, voted to adopt the Report and its conclusions and recommendations. *Id.* at 19 (R. 103). The Report and all of the documentary materials reviewed by the Propeller Guard Subcommittee were then forwarded to the Coast Guard. Subcommittee Report at 1 (R. 30).

After considering these voluminous materials, the Coast Guard decided to accept all of the recommendations of the NBSAC and the Subcommittee Report. Pet. App. 12. In particular, with respect to the NBSAC's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard concluded that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards.*" *Ibid.* (emphasis added). At the same time, the Coast Guard announced that it would continue to "review and retain any information * * * regarding development and testing of new propeller guarding devices or other information on the state of the art." *Id.* at 13.

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[8] For this reason, it is not surprising that, as petitioner concedes, "no major marine engine manufacturer ha[s] equipped any of its boats with any type of propeller guard." Pet. 5.

Not surprisingly, the courts that have considered claims such as petitioner's on the merits have reached the same conclusion as the Coast Guard regarding the feasibility and safety of propeller guards. In *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991), for example, the Eleventh Circuit commented that "[b]oth parties' witnesses * * * testified regarding potential difficulties that these devices might engender" and that "[b]oth parties' experts * * * explained that guards themselves can become a danger as they move through the water." 903 F.2d at 1509. Based on this undisputed evidence, the Eleventh Circuit concluded (*ibid.*; emphasis added):

> [C]urrent industry standards, and the federal regulations, simply reflect the consensus of experts that the industry's adaption of propeller guards at this point *would not only be infeasible, but unwise, unsafe and unfortunate*.

To the same effect are *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993)("the record shows * * * the absence of evidence that there was a feasible, safer alternative design for a propeller guard"), and *Pree* v. *Brunswick Corp.*, 983 F.2d 863 (8th Cir.), cert. denied, 114 S. Ct. 65 (1993)("[e]xperts for both sides * * * testified regarding the potential difficulties that propeller guards might engender"). State courts have reached the identical result. See, *e.g.*, *Fitzpatrick* v. *Madonna*, 424 Pa.Super. 473, 623 A.2d 322 (1993); *Beech* v. *Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991).

C. The Proceedings Below

Petitioner Joan Carstensen was injured in 1989 when she fell out of a boat manufactured by respondents and was struck by the engine's propeller. Pet. App. 1-2. She brought a diversity action in federal court seeking damages from respondents under state law theories of negligence, strict liability, and breach of warranties based on respondents' "fail[ure] to design, manufacture, or equip the boat and

engine with a propeller guard." Pet. 9; Pet. App. 2. The district court concluded that petitioner's claims were preempted by the Boat Safety Act and granted respondents' motion to dismiss. *Id.* at 8-11.

The court of appeals affirmed. Pet. App. 1-7. The Eighth Circuit found that the Coast Guard had "specifically rejected proposed regulations requiring the use of propeller guards" and that this decision "has the same preemptive force as a decision to regulate." *Id.* at 3. The court concluded that petitioner's claims were preempted by the Boat Safety Act because "[a]ny state law or regulation requiring manufacturers to install propeller guards would not be identical to the Coast Guard regulatory position." *Id.* at 4.

The court of appeals rejected petitioner's argument that common law actions are not included within the scope of the Boat Safety Act preemption clause. Relying on this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992), the Eighth Circuit found "'no distinction between positive enactments and common law.'" Pet. App. 4. "Allowing a jury to assess damages for failure to install a propeller guard would create, in effect, a state requirement that guards be installed. State damage actions based on such failure would establish a regulation 'imposing a requirement for associated equipment' that is not identical to th[e] [requirement] prescribed by the Coast Guard." *Ibid.* The court also rejected petitioner's argument that the Act's savings clause precluded federal preemption of her claims. *Id.* at 4-6.

REASONS FOR DENYING THE PETITION

After an extensive public investigation, the Coast Guard concluded that, for safety reasons, propeller guards should not be required on boats. Invoking exaggerated claims of the "'devastation'" caused by boat propellers (Pet. 5; see note 6, *supra*), petitioner seeks to second-guess that federal determination and impose state law liability on respondents for not including a propeller guard on the boat that stuck her. This

proposed common law rule, however, is plainly preempted by Section 4306 of the Boat Safety Act, because it is "not identical" to a considered decision made by the Coast Guard not to mandate propeller guards. Moreover, even in the absence of express preemption, petitioner's claim would be impliedly preempted because it conflicts with and frustrates the purpose of the federal boat safety scheme. Not surprisingly, virtually every court to consider the question has agreed with the courts below that common law claims such as petitioner's are preempted by the Boat Safety Act.[9]

I. THE DECISION IN THIS CASE DOES NOT CONFLICT WITH *MYRICK*

Petitioner's principal contention (Pet. 11-16) is that the decision below should be summarily reversed because it conflicts with this Court's recent decision in *Myrick*, which petitioner alleges "made clear that the mere absence of federal regulation with respect to a particular product has no preemptive effect whatsoever." Pet. 11. Despite petitioner's best efforts to squeeze this case into the limited holding of *Myrick*, the cases are fundamentally different and easily reconciled.

A. In *Myrick*, the Court interpreted the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 ("Motor Vehicle Safety Act"), and Federal Motor Vehicle Safety Standard 121, 49 C.F.R. § 571.121

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[9] See *Ryan* v. *Mercury Marine*, 531 N.W.2d 793 (Mich. App. 1995); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Parker* v. *Outboard Motor Corp.*, No. J90-0011(L) Slip. Op. at 2 (S.D. Miss. Feb. 28, 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993).

("Standard 121"), adopted by the National Highway Traffic Safety Administration ("NHTSA"). The Motor Vehicle Safety Act has a preemption clause (15 U.S.C. § 1392(d)), which provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Standard 121 at issue in *Myrick* "imposed stopping distances and vehicle stability requirements for trucks." 115 S. Ct. at 1486. Because of the short stopping distances required by the standard, "several manufacturers notified NHTSA that ABS [anti-lock braking systems] would be required" to comply with Standard 121. *Ibid.* On judicial review of Standard 121, the Ninth Circuit suspended the standard because "NHTSA had failed to consider the high failure rate of ABS devices * * * [and] 'there [was] a strong probability that [ABS] had created a potentially more hazardous highway situation * * *.'" *Id.* at 1486 (quoting *Paccar, Inc.* v. *NHTSA*, 573 F.2d 632, 642-643 (9th Cir.), cert. denied, 439 U.S. 862 (1978)). Thereafter, NHTSA amended Standard 121 "so that the stopping distances and lock-up requirements no longer applied to trucks and trailers." 115 S. Ct. at 1486.[10]

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[10] NHTSA "left the unamended Standard 121 in the Code of Federal Regulations so that the 'affected sections [could] most easily be reinstated' when the agency met *Paccar*'s requirements. * * * NHTSA also stated that the provisions would remain in place so that manufacturers would know 'what the agency still considers to be reasonable standards for minimum acceptable performance.'" 115 S. Ct. at 1486 (citations omitted).

The plaintiffs in *Myrick* were involved in accidents with trucks manufactured by the defendants. The plaintiffs brought suit, "alleg[ing] that the absence of ABS was a negligent design that rendered the vehicles defective." 115 S. Ct. at 1485. The defendants contended that these tort claims were both expressly and impliedly preempted by the Motor Vehicle Safety Act, but this Court rejected those arguments.

The Court began its analysis with the Motor Vehicle Safety Act's preemption clause, which "applies only '[w]henever a Federal motor vehicle safety standard * * * is in effect' with respect to 'the same aspect of performance' regulated by a state standard." 115 S. Ct. at 1487. Because "Standard 121 remains suspended," the Court concluded that "[t]here is simply no minimum objective standard stated at all," and the states were therefore free to adopt their own standards addressing the same issue. *Ibid.* Specifically, the Court found

> no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, *the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes*.

Ibid. (emphasis added). Because the Court determined that there was no federal standard in effect, and that the absence of a standard did not indicate that federal authorities intended the area to be unregulated, it concluded that there was no express preemption (*ibid.*) and no implied conflict preemption (*id.* at 1487-1488).

B. This case is markedly different from *Myrick* in several critical respects. Here, unlike in *Myrick*, there is conclusive evidence that "the lack of federal regulation * * * result[ed] from an affirmative decision of agency officials to refrain from" requiring propeller guards. 115 S. Ct. at 1487. This was not, as petitioner suggests, a cavalier decision by

the Coast Guard based on cursory "internal deliberations." Pet. 15. The record to the contrary is overwhelming: a year-long investigation of propeller-strike incidents and data by a federal advisory committee (the Propeller Guard Subcommittee of the NBSAC), with nationwide public hearings and voluminous documentary evidence, culminating in a lengthy report recommending — *for reasons of safety* — that there should be "no regulatory action to require propeller guards." See pages 4-9, *supra*.[11]

The Coast Guard, after reviewing the Report and all of the evidence accumulated by the NBSAC, independently concluded that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motor boats." Pet. App. 12. As the court observed in *Stanley* v. *Bertram-Trojan, Inc.*, 855 F. Supp. 657, 658 (S.D.N.Y. 1994), "propeller guards were specifically considered by the Coast Guard as a subject of regulation and were found not feasible because they may increase danger rather than reduce it."

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[11] In light of the extensive Coast Guard proceedings, which included notice of public meetings in the Federal Register and a written ruling announcing the final agency decision, petitioner's assertion (Pet. 8) that "[t]he Coast Guard's decision not to regulate propeller guards was not the product of any formal rulemaking proceeding" is preposterous. See also Pet. 15 ("there was no rulemaking of any sort"). The Coast Guard took pains "to insure that the public [was] given an opportunity to participate in the rulemaking and [was] notified of its results." Pet. 6 n.3. Indeed, as noted earlier (see note 5, *supra*), *petitioner's counsel took an active role in those proceedings*. Petitioner apparently would require the Coast Guard to take the senseless step of issuing a regulation stating its intention *not* to regulate — a result required neither by the Boat Safety Act (see note 15, *infra*) nor by preemption law generally. Petitioner cites no support for her illogical position.

The Coast Guard's decision on grounds of safety not to require propeller guards was not, as petitioner would have it, "mere federal regulatory inaction, without more." Pet. 13. It was precisely the kind of federal "inaction *joined with action*" that this Court in *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (emphasis added), held preempts state law. In that case, the Court stated (*ibid.* (emphasis in original)):

> [D]eliberate federal inaction [does not] always imply pre-emption * * *. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field [unregulated], *then* the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action.

And this Court has repeatedly held that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (emphases in original); see also *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-152 (1989).[12]

In this case, the Boat Safety Act and accompanying Coast Guard regulations — "a comprehensive federal scheme," *Puerto Rico Dep't of Consumer Affairs*, 485 U.S. at 503 — intentionally left propeller guards unregulated. In light of the voluminous record documenting the federal decision to leave

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[12] "'[W]here failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted * * * to enact such a regulation." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

propeller guards unregulated, "the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action." *Ibid.*[13]

In sum, this case is fundamentally different from *Myrick*, where there was no "affirmative decision of agency officials to refrain" from regulation. 115 S. Ct. at 1487.[14] The Coast Guard made an "affirmative decision," based on considerations of safety, that propeller guards should *not* be required on recreational boats. The state law rule advocated by petitioner, which would mandate propeller guards, is not "identical" to a federal regulation and is therefore expressly preempted by Section 4306 of the Boat Safety Act; and it is impliedly preempted because it conflicts with and would frustrate the federal policy adopted by the Coast Guard.[15]

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[13] Contrary to petitioner's assertion, the Eighth Circuit did not decide that "*any* federal decision not to regulate" preempts state law (Pet. 16 (emphasis in original)). In this case there was overwhelming evidence of an "affirmative decision" by an expert federal agency not to require propeller guards for safety reasons. See 115 S. Ct. at 1487.

[14] Indeed, in *Myrick* NHTSA plainly wanted to regulate stopping distances and vehicle stability, but was precluded by a court decision from doing so. See page 12, *supra*. Clearly the agency's policies were not frustrated by a state law requirement addressing those aspects of vehicle performance.

[15] Petitioner argues (Pet. 15) that "Congress clearly intended that only properly promulgated regulations would exert preemptive force under the Act." That reading, however, is belied by the language of the express preemption provision of the Boat Safety Act, which preempts any state law or regulation that "is not identical to a regulation *prescribed* by the Coast Guard" (46 U.S.C. § 4306) (emphasis added).

Contrasting this language with the preemption clause interpreted in *Myrick* illustrates petitioner's fundamental misreading

II. THERE IS NO CONFLICT IN THE LOWER COURTS MERITING REVIEW BY THIS COURT

Petitioner also contends (Pet. 16-17) that review by this Court is necessary to resolve a "clear split between the Eighth Circuit and the Texas Supreme Court" on the preemption of propeller guard tort claims under the Boat Safety Act. Indeed, petitioner suggests that there is a broad split "in divergent lower court decisions regarding the scope of preemption" under the Act. *Id.* at 19. Petitioner's claim of deep divisions in the lower courts is wholly illusory.

Virtually every federal and state court to address the issue has concluded that a state law claim that a boat was defective because its engine lacked a propeller guard is preempted by the Boat Safety Act.[16] In the face of this overwhelming authority, petitioner cites a single decision by the Texas Supreme Court that is premised, in large part, on

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of both. *Myrick* construed the Motor Vehicle Safety Act's preemption provision, which preempts state law only when a federal safety standard "is in effect" (15 U.S.C. § 1392(d)). In *Myrick*, the absence of a federal regulation under the Motor Vehicle Safety Act meant that the "States remain[ed] free to 'establish, or to continue in effect,' their own safety standards." 115 S. Ct. at 1487. By contrast, the Boat Safety Act, read literally, provides that in the absence of a federal regulation the states are *not* free to regulate. (Here, of course, we have not just the mere absence of a federal regulation but the considered decision of the Coast Guard not to regulate, for reasons of safety.)

[16] See note 9, *supra*. Petitioner cites *Eggen* v. *Griffith*, No. B-C-89-31 (E.D. Ark. May 28, 1991), an unpublished opinion holding that a "no-propeller-guard" claim was not preempted by the Boat Safety Act. See Pet. 19. That decision, of course, has now been overruled by the Eighth Circuit's decision in this case. Petitioner's other two cases (*Mulhern* and *Rubin*) are intermediate state court decisions that are readily distinguishable, as the court below explained. See Pet. App. 6; note 23, *infra*.

a cramped view of federal preemption that was subsequently rejected by this Court in *Myrick*.

In *Moore* v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), cert. denied, 115 S. Ct. 664 (1994), the court held that a "no-propeller-guard" tort claim was not preempted by the Boat Safety Act. The Texas court "recognize[d] that [its] holding conflicts" with a long line of federal and state court decisions. *Id.* at 252. Nonetheless, the court did not find these decisions "persuasive," in light of "the Supreme Court's apparent turn to stricter preemption analysis." *Ibid.* The "apparent turn" in preemption analysis was, in fact, the decision of the Eleventh Circuit in *Myrick*, which misread this Court's decision in *Cipollone* to "question[] the propriety of an implied preemption analysis when presented with an express preemption clause." 889 S.W.2d at 251 n.10.

This Court flatly repudiated the Eleventh Circuit's analysis in *Myrick*, holding that the presence of an express preemption clause "does not mean that the express clause entirely forecloses any possibility of implied preemption." 115 S. Ct. at 1488. Thus, the continuing validity and relevance as a precedent of the Texas Supreme Court's decision in *Moore* is completely undermined. Moreover, other aspects of the decision in *Moore* conflict with decisions of this Court in several important respects.

A. First, the *Moore* court held (and petitioner argues in passing (Pet. 17)) that the Boat Safety Act's preemption of any state "law or regulation" does not include state common law claims. See 889 S.W.2d at 249-250 ("declin[ing] to read 'law or regulation' so broadly as to include common-law claims"). This holding is wholly at odds with this Court's decision in *Cipollone*, which eliminated any doubt about whether the state "law or regulation" referred to in the preemption provision of the Act, 46 U.S.C. § 4306, includes state common law.

The Court in *Cipollone* held that the express preemption provision at issue in that case included common law duties even though it spoke only in terms of "'requirement[s] or prohibition[s] * * * imposed under State law.'" See 112 S. Ct. at 2619-2621 (plurality) (citation omitted); *id.* at 2634 (Scalia, J.). The *Cipollone* Court held that it made no difference that the preemption clause failed to refer expressly to common law claims, because "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" *Id.* at 2620 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)). See, *e.g.*, *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732, 1737 (1993) ("[l]egal duties imposed * * * by the common law fall within the scope of the[] broad phrases" "law, rule, regulation, order, or standard"); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972) ("[w]e see no reason not to give 'laws' its natural meaning * * *, and therefore conclude that * * * [it embraces] claims founded upon common law as well as those of statutory origin"); *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 71 (1938) ("law" includes "the unwritten law of the State as declared by its highest court").[17]

Since the decision in *Cipollone*, the widely accepted understanding among the federal courts of appeals is that statutory language generically preempting state "law" or "requirements" necessarily includes claims based on state common law.[18] This is the uniform view of the courts

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[17] See also *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114-115 (1987) (referring to state common law "safety standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

[18] See *National Bank of Commerce of El Dorado* v. *Kimberly-Clark Corp.*, 38 F.3d 988, 991 (8th Cir. 1994); *Gile* v. *Optical Radiation Corp.*, 22 F.3d 540, 542 (3d Cir.), cert. denied, 115 S.

deciding preemption questions under the Boat Safety Act. And the overwhelming majority of courts across the country have followed *Cipollone* and reached the same conclusion in interpreting the scope of express preemption clauses in numerous other federal health and safety statutes, including the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136, *et seq.*,[19] the Federal Hazardous Substances

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Ct. 429 (1994); *Worm* v. *American Cyanamid Co.*, 5 F.3d 744, 748-749 (4th Cir. 1993); *King* v. *E.I. Du Pont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir.), cert. dismissed, 114 S. Ct. 490 (1993); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), cert. denied, 114 S. Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), cert. denied, 114 S. Ct. 60 (1993); *Stamps* v. *Collagen Corp.*, 984 F.2d 1416, 1424 (5th Cir.), cert. denied, 114 S. Ct. 86 (1993).

[19] See, *e.g.*, *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994); *Bingham* v. *Terminix Int'l Co.*, 850 F. Supp. 516, 520 (S.D. Miss. 1994); *Allen* v. *Pennco Engineering Co.*, 847 F. Supp. 1315, 1319 (M.D. La. 1994); *Trinity Mountain Seed Co.* v. *MSD Agvet, Div. of Merck & Co.*, 844 F. Supp. 597, 601 (D. Idaho 1994); *Quad R Farms* v. *American Cyanamid Co.*, 840 F. Supp. 694 (D. Minn. 1993); *DerGazarian* v. *Dow Chem. Co.*, 836 F. Supp. 1429, 1447 (W.D. Ark. 1993); *Kolich* v. *Sysco Corp.*, 825 F. Supp. 959, 961 (D. Kan. 1993); *Levesque* v. *Miles Inc.*, 816 F. Supp. 61, 69 (D.N.H. 1993); *Casper* v. *E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903, 907 (E.D. Wash. 1992); *Burke* v. *Dow Chem. Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992); *Gibson* v. *Dow Chem. Co.*, No. Civ. A. 92-30, 1992 WL 404681, *2 (E.D. Ky. Oct. 19, 1992); *Brennan* v. *Dow Chem. Co.*, 613 So. 2d 131, 132 (Fla. Dist. Ct. App. 1993); *Yowell* v. *Chevron Chem. Co.*, 836 S.W.2d 62, 66 (Mo. Ct. App. 1992); *June* v. *Laris*, 602 N.Y.S.2d 778, 784 (N.Y. Sup. Ct. 1993), aff'd, No. 70011, 1994 WL 601588 (N.Y. App. Div. Nov. 3, 1994); *Hopkins* v. *Ciba-Geigy Corp.*, 432 S.E.2d 142, 145-146 (N.C. Ct. App. 1993).

Act, 15 U.S.C. §§ 1261, *et seq.*,[20] and the Medical Device Amendments of 1976 to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 360c, *et seq.*[21]

In sum, this ground for the decision in *Moore* is an aberration. The Eighth Circuit's conclusion that the reference to state "law" in the preemption clause of the Boat Safety Act encompasses state common law is fully in accord with the decisions of this Court and virtually every other court. There is no reason for further review.

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[20] See, *e.g.*, *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), cert. denied, 113 S. Ct. 2999 (1993); *DeHaan* v. *Whink Prods. Co.*, No. 91 C 0014, 1994 WL 24322, *6 (N.D. Ill. Jan. 26, 1994); *Salazar* v. *Whink Prods. Co.*, No. 93CA0055, 1994 WL 115876, *2 (Colo. Ct. App.), cert. denied, 115 S. Ct. 1315 (1994); *State ex rel. Jones Chems., Inc.* v. *Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994).

[21] See, *e.g.*, *Michael* v. *Shiley, Inc.*, 46 F.3d 1316, 1320 (3d Cir. 1995), petition for cert. filed, 63 U.S.L.W. 3874 (June 2, 1995) (No. 94-1971); *Mendes* v. *Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994); *King* v. *Collagen Corp.*, 983 F.2d 1130, 1135 (1st Cir.), cert. denied, 114 S. Ct. 84 (1993); *Slater* v. *Optical Radiation Corp.*, 961 F.2d 1330, 1333 (7th Cir.), cert. denied, 113 S. Ct. 327 (1992); *Richman* v. *W.L. Gore & Assoc., Inc.*, 881 F. Supp. 895 (S.D.N.Y. 1995); *Bokis* v. *American Medical Sys., Inc.*, 875 F. Supp. 748, 751 (W.D. Ok. 1995); *Mitchell* v. *Collagen Corp.*, 870 F. Supp. 885, 887 (N.D. Ind. 1994); *Griffin* v. *Medtronic, Inc.*, 840 F. Supp. 396, 397 (D. Md. 1994); *Tucker* v. *Collagen Corp.*, No. 93 C 2375, 1994 WL 87367, *3 (N.D. Ill. Mar. 16, 1994); *Kemp* v. *Pfizer, Inc.*, 835 F. Supp. 1015, 1020 n.4 (E.D. Mich. 1993); *Reiter* v. *Zimmer, Inc.*, 830 F. Supp. 199, 203 (S.D.N.Y. 1993); *Cameron* v. *Howmedica, Div. of Pfizer Hosp. Prods. Group, Inc.*, 820 F. Supp. 317, 319 (E.D. Mich. 1993); *Hunsaker* v. *Surgidev Corp.*, 818 F. Supp. 744, 751 (M.D. Pa. 1992), aff'd, 5 F.3d 1489 (3d Cir. 1993); *Covey* v. *Surgidev Corp.*, 815 F. Supp. 1089, 1094 (N.D. Ohio 1993).

B. In rejecting federal preemption under the Boat Safety Act, the *Moore* court also relied (889 S.W.2d at 250), as does petitioner (Pet. 17), on the Act's so-called "savings" clause, 46 U.S.C. § 4311(g) (compliance with federal standards or regulations "does not relieve a person from liability at common law"). The Texas Supreme Court maintained that this clause shelters common law claims from preemption.[22]

Section 4311(g), however, was not intended by Congress to restrict the scope of preemption. Instead, as its narrow language suggests, the section negates only an affirmative defense of compliance with a government standard. As the Senate Report on the Boat Safety Act states (at 32), the "purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability." Indeed, although petitioner asserts that Section 4311(g) is an "express *anti*-preemption provision" (Pet. 3), it is not even included in the part of the Act (Section 4306) that addresses federal preemption. See *Easterwood*, 113 S. Ct. at 1736.

Even if it were viewed as a limitation on the Boat Safety Act's broad preemption provision, the "savings" clause indicates, at most, Congress' intent not to occupy the entire field of boat safety, so that common law claims could continue to be brought in areas not covered by a federal

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[22] The statute in *Cipollone*, unlike the Boat Safety Act, lacked a savings clause. The mere presence of a savings clause in the Boat Safety Act cannot be dispositive on the issue of federal preemption, however, because this Court found express preemption of common law claims in *Easterwood*, 113 S. Ct. at 1736-1737, and the statute at issue in that case had a savings clause. See also *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037-2040 (1992) (finding express preemption under the Airline Deregulation Act, which has a savings clause).

safety standard. Faced with similar provisions in other statutes, this Court has consistently interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose common law liability for acts expressly permitted by a federal agency, the Court explained that general savings clauses do not allow states to enforce state law claims that conflict with federal law. *Id.* at 328. Rather, general savings clauses are included in federal statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute — not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections — but to preserve all existing rights which were not inconsistent with those created by the statute." And in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Court held that a broad savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*

This Court has consistently adhered to these pronouncements. See, *e.g.*, *Morales*, 112 S. Ct. at 2037; *International*

Paper Co. v. *Ouellette*, 479 U.S. 481, 493-494 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976). Consistent with these precedents, Section 4311(g) was added to the Boat Safety Act not to defeat the statutory goal of creating a nationally uniform boat safety program, but rather to indicate Congress' intent not to preempt the remainder of the field of boat safety (such as safe boat operation and use, see note 3, *supra*) *not* covered by and *not* inconsistent with that federal program.[23] Petitioner's perverse reading of the "savings" clause, which would allow states to overrule Coast Guard determinations, would cause the Act to "destroy itself."

C. Finally, the *Moore* court relied on the traditional "presumption against preemption [of] * * * state regulation of health and safety matters" (889 S.W.2d at 249) and deferred to "the significant state interests at issue" in the case. *Id.* at 251. This deference to state interests and the presumption against preemption are entirely misplaced in the context of the Boat Safety Act, which implicates the "historic federal maritime jurisdiction." Senate Report at 17. Indeed, in adopting the Act's preemption clause, Congress invoked the "long history of preemption in maritime safety matters." *Id.* at 20. Boat safety is simply not and has never been a subject of traditional state regulation.

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[23] For example, in two state cases cited by petitioner (Pet. 19-20), the courts held that common law claims based on defectively designed and installed equipment were not preempted by the Boat Safety Act. *Mulhern* v. *Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. Ct. App. 1988) (defective throttle), and *Rubin* v. *Brutus Corp.*, 487 So.2d 360 (Fla. Dist. Ct. App. 1986) (defective seat). As the Eighth Circuit observed in discussing these decisions, "common law claims asserting liability for defectively designed products that are actually installed may not be preempted." Pet. App. 6.

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In the final analysis, petitioner can offer no credible reason why this Court should review the decision below, which is fully consistent with *Myrick* and follows a long line of federal and state court decisions finding preemption under the Boat Safety Act. Moreover, the Eighth Circuit's conclusion that petitioner's claims are preempted is plainly correct. Petitioner seeks to establish a state common law rule that would require propeller guards on all recreational boats. In the Boat Safety Act, however, Congress gave the Coast Guard plenary authority to make the determination whether to require propeller guards, and the Coast Guard expressly decided — after an exhaustive study — *not* to mandate that item of equipment. Petitioner's common law claim thus conflicts directly and substantially with this expert federal determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 95-120

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1995

Joan Carstensen,

Petitioner,

v.

CORRECTED COPY

Brunswick Corp., Mercury Marine Corp., and Sea Ray Boats, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

Respondents' opposition is based on two incorrect factual premises that infect, and render invalid, all of their arguments about why this petition should be denied. First, respondents claim that "[p]etitioner seeks to establish a state common law rule that would require propeller guards on all recreational boats." Opp. at 25. Second, respondents repeatedly suggest that the Coast Guard "affirmatively decided" that propeller guards should not be permitted on any boats. *See, e.g., id.* at 13-16. Based on these factual premises, respondents contend that petitioner's state common-law claim "conflicts directly and substantially with [the Coast Guard's] expert federal determination." *Id.* at 24. This alleged conflict is at the core of respondents' arguments about why this case is distinguishable from *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), and why the Texas Supreme Court's decision in *Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), *cert. denied*, 115 U.S. 664 (1994), is an "aberration" that does not create a sufficient basis for review by this Court. *Opp.* at 16, 21.

In fact, however, neither of the factual premises relied upon by respondents is correct. First, petitioner does not in any way seek to establish a common law rule "that would require propeller guards on all recreational boats." *Id.* at 25. To the contrary, all petitioner seeks to establish is that respondents should be liable for damages for having failed to install a propeller guard on the *particular* model at issue. A ruling in petitioner's favor on this point would not establish any mandatory requirement that all boat manufacturers must install propeller guards on all boats; indeed, it would not even require respondents to install such guards on the particular boat at issue. Rather, such a ruling would only require that respondents compensate petitioner for her injuries.

Second, the Coast Guard never even *considered* whether propeller guards should be banned on all -- or even *any* -- boats. Rather, the agency only considered whether to attempt to develop a universal, across-the-board *requirement* for propeller guards on

all boats. Ultimately, the Coast Guard decided not to issue such a requirement because it concluded that there was no technology appropriate for a national, one-type-fits-all regulation applicable to *all* types of boats. *See* App. 12. There was never any decision that propeller guards were dangerous for each and every boat, or that their use should be restricted in any way.

Thus, respondents' factual arguments about the conflict between the relief sought by petitioner and the Coast Guard's decision not to regulate propeller guards simply are not true. Simply put, there is no inconsistency whatsoever between petitioner's state common-law claim -- that her boat was defective because it lacked a propeller guard -- and the Coast Guard's decision not to mandate the use of propeller guards on all boats. Rather, the only conflicts here are between the decision below, this Court's decision in *Myrick*, and the decision of the Texas Supreme Court in *Moore*.

I. THERE IS A DIRECT CONFLICT BETWEEN THE DECISION BELOW AND *MYRICK*.

Respondents' principal argument in opposition is that review is unwarranted because there is no conflict between the Eighth Circuit's ruling in this case and *Myrick*. They claim that the Coast Guard's decision not to require propeller guards has preemptive force because, unlike the agency decision in *Myrick*, "there is conclusive evidence that 'the lack of federal regulation * * * result[ed] from an affirmative decision of agency officials to refrain from' requiring propeller guards." Opp. at 13 (quoting *Myrick*, 115 S. Ct. at 1487). This "affirmative decision" not to regulate, in respondents' view, has preemptive effect even though the Coast Guard has never prescribed any regulation banning (or even addressing) the use of propeller guards.

This argument is baseless. First, *Myrick*'s holding was grounded in the simple fact that -- as in this case -- there was *no federal standard in place regarding the product at issue*. This

Court held that preemption does not lie where "[t]here is simply no minimum objective standard stated at all." 115 S. Ct. at 1487. This common sense proposition is the core holding of *Myrick*, and it applies with full force in this case: the unavoidable truth is that, as in *Myrick*, the Coast Guard has not issued *any* "minimum objective standard" with respect to propeller guards. Moreover, as in *Myrick*, "there is no evidence that [the Coast Guard] decided that [propeller guards] should be free from all state regulation . . .." 115 S. Ct. at 1487. To the contrary, the record reveals that the Coast Guard never intended its action to have *any* effect on state power. *See* Petition at 14. *Myrick* made clear that there is no preemption under these circumstances; the fact that the Coast Guard decided not to require propeller guards on all boats is irrelevant.

Respondents also attempt to distinguish *Myrick* on the ground that the Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.*, and the Boat Safety Act are "completely different." Opp. at 1. In fact, however, on the issue relevant to *Myrick*, the statutes are exactly the same: they both contain express preemption provisions that only apply when a federal regulation is in effect. *Compare* 46 U.S.C. § 4306 (Boat Safety Act preemption provision applies when there is "a regulation prescribed under section 4302 of this title.") *with* 15 U.S.C. § 1392(d) (Motor Vehicle Safety Act preemption provision applies "[w]henever a Federal motor vehicle safety standard is in effect . . .").[1] In this case, no such regulation has ever been prescribed with respect to propeller guards on boats. *Myrick*, therefore, controls.

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[1] In addition, unlike the statutes relied on by respondents, *see* Opp. at 20-21, both the Motor Vehicle Safety Act and the Boat Safety Act contain express anti-preemption provisions explicitly *preserving* common law claims. *Compare* 46 U.S.C. § 4311(g) ("[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.") *with* 15 U.S.C. § 1397(k) ("[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.")

Respondents attempt to counter this fact by arguing that, even though no regulation has been prescribed, the Coast Guard's decision not to prescribe one was the product of a formal rulemaking proceeding. *See* Opp. at 14 n.11. This contention, however, is baseless. To begin with, as *Myrick* makes clear, the existence of formal rulemaking has nothing to do with whether state law is preempted. (Indeed, there were extensive formal rulemaking proceedings in *Myrick*.) There must be an actual regulation in place.

Moreover, the Coast Guard never even begun, much less completed, a formal rulemaking process with respect to propeller guards. There was no "notice of proposed rulemaking [published] in the Federal Register," 5 U.S.C. § 553(1); no "opportunity to participate" in a formal rulemaking proceeding, *id.* § 553(2); and, of course, no publication of any "substantive rule" banning the use of propeller guards on boats. *Id.* § 553(3).[2] Even a computerized

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[2] Respondents argue that the Coast Guard is not obligated to follow the notice-and-comment rulemaking procedures of the Administrative Procedure Act (the "APA") because the Boat Safety Act merely directs the agency to "prescribe regulations." Opp. at 16. Presumably, what respondents deem significant is the absence of the verb "to promulgate," which is the term employed in the APA with reference to rulemaking. *See* 5 U.S.C. § 553. This is, however, a distinction without a difference. It is well established that the APA's rulemaking provisions apply with full force to all "substantive rules" that have "substantive legal effect." *FLRA v. U.S. Dep't of Navy*, 966 F.2d 747, 762 n.14 (3d Cir. 1992); *see also Telecommunications Research and Action v. F.C.C.*, 800 F.2d 1181, 1186 (D.C. Cir. 1986). It is difficult to imagine a more "substantive" rule than a decision by the Coast Guard to *ban* the use of propeller guards throughout the United States. The notion that such a rule would somehow be exempt from the APA because Congress used the word "prescribe," rather than "promulgate," is baseless. (Not surprisingly, respondents cite no authority for this creative proposition.) In any event, other provisions of the Boat Safety Act and its legislative history make clear that Congress did intend the Coast Guard to prescribe safety regulations in accordance with the procedures of the APA. *See* 46 U.S.C. § 4302(b) ([e]ach regulation prescribed under this section shall specify an effective date that is not earlier than 180 days from the date the regulation was published"); S. Rep. No. 92-248, 92d Cong., 1st Sess. 1 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1333, at 6 (safety standards to be issued under the Boat

search of the *Federal Register* and the *Code of Federal Regulations* -- the official U.S. government publications that contain all federal regulatory determinations -- yields no hint that the Coast Guard ever took any action to ban states from requiring propeller guards. It defies logic to contend that the Coast Guard preempted state regulation of propeller guards in secret -- yet that is precisely the upshot of respondents' theory in this case.

Finally, respondents argue that *Myrick* does not apply because the Coast Guard "made an 'affirmative decision,' based on considerations of safety, that propeller guards should *not* be required on propeller guards." Opp. at 16. This contention is belied by the facts. As explained above, the agency never even considered whether to *ban* propeller guards on boats. Rather, as respondents concede, the whole point of the agency's internal deliberations was to decide whether to *require* "some form of propeller guard." Opp. at 5. The agency's decision not to issue such a requirement is hardly the sort of "inaction joined with action" that has been held to preempt all applicable state law.

Regardless of how one characterizes the Coast Guard's proceedings, the bottom line is that the agency has never prescribed a "regulation . . . under section 4302." 46 U.S.C. § 4306. That being so, as in *Myrick*, the states are free to act. If respondents' contrary reading of *Myrick* carries the day, then any agency decision not to commence rulemaking with respect to a safety standard could have preemptive force -- even if the agency never intended to limit states' power in any respect. This would place federal agencies in a Catch 22, whereby a decision not to *require* a particular device could take on the same force of law as a formal regulation *banning* the use of such a device nationwide. If *Myrick* means anything, it means that there can be no preemption under these circumstances.

Safety Act must be "*promulgated* by the Secretary of the Department in which the Coast Guard is operating -- presently the Secretary of Transportation") (emphasis added).

II. THERE IS A CLEAR SPLIT BETWEEN THE DECISION BELOW AND *MOORE*.

Respondents' second argument is that there is no conflict in the lower courts meriting review because the Texas Supreme Court's decision in *Moore* was "premised, in large part, on a cramped view of federal preemption that was subsequently rejected in *Myrick*." Opp. at 18. Respondents also claim that *Moore* was an "aberration," and in direct conflict with scores of other decisions regarding federal preemption. *See id.* at 18-24. Both claims are meritless.

First, contrary to respondents' contention, *Moore's* analysis was unaffected by *Myrick*, and stands in direct conflict with the Eighth Circuit's decision in this case. *Myrick* clarified that the mere presence of an express preemption clause in a statute, without more, does not preclude any inquiry into implied preemption. *See* 115 S. Ct. at 1488. Respondents argue that this holding "completely undermined" the Texas Supreme Court's holding in *Moore*. *See* Opp. 18. However, *Moore* included an analysis of *both* express *and* implied preemption under the Boat Safety Act. *See* Petition at 17-18. Because *Moore* reached the issue of implied preemption, there can be no claim that the Texas Supreme Court's decision was rendered invalid by *Myrick*. With or without *Myrick*, *Moore* stands in direct conflict with the decision below.[3]

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[3] We note that petitioner does not read *Myrick* as compelling an inquiry into implied preemption analysis in this case; to the contrary, petitioner believes that such an inquiry is *precluded* under the Boat Safety Act. In *Myrick*, this Court held that "[t]he fact that an express definition of the pre-emptive reach of a statute 'implies' -- i.e. supports a reasonable inference -- that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption." 115 S. Ct. at 1488. However, in the Boat Safety Act, Congress did not simply enact an express preemption clause that "implies," but leaves open the question of whether, "other matters" are preempted. *Id.* Rather, it enacted an express *anti*-preemption provision (the savings clause, 46 U.S.C. § 4311(g)) that explicitly preserves common law

Nor is there any basis for respondents' claim that *Moore* is somehow "aberration[al]" and in conflict with numerous other preemption decisions. *See* Opp. at 18-24. On this point, respondents' first argument is that *Moore*'s holding "is wholly at odds with this Court's decision in *Cipollone [v. Liggett Group*, 112 S. Ct. 2608 (1992)], which eliminated any doubt about whether the state 'law or regulation' referred to in the preemption provision of the Act, 46 U.S.C. § 4306, includes state common law." Opp. at 18. However, in *Cipollone*, this Court considered the preemptive effect of an entirely different statute -- the Public Health Cigarette Smoking Act of 1969. That Act modified the preemption provision of an earlier statute to provide that "'No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of [the] Act.'" *Id.* at 2617. In considering this language, the Court acknowledged the general presumption against preemption, but concluded that it was constrained to interpret the phrase "State law" in the preemption provision of the 1969 Act to encompass state common law because the earlier version of that very Act had less restrictive preemption language that did not encompass state common law. In light of this history, *Cipollone* concluded that Congress, by enacting the broader language in the 1969 Act, intended to preempt some state common law tort claims. *Id.* at 2621.

The Boat Safety Act has no comparable history indicating an intent on Congress' part to preempt common law claims. To the contrary, when it enacted the Boat Safety Act, Congress made clear its intention *not* to preempt such claims by including an express, *anti*-preemption provision that expressly *preserves*

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claims. It is the existence of this savings clause that precludes implied preemption under the Safety Act. In any event, the Texas Supreme Court *did* reach the issue of implied preemption in *Moore*, and thus its decision cannot be said to conflict with *Myrick* regardless of how one interprets this Court's ruling in that case.

common law claims. *See* 46 U.S.C. § 4311(g). Unlike the Boat Safety Act, the statutes at issue in *Cipollone* did not contain provisions expressly preserving common law claims. In analyzing those statutes, however, the Court explicitly noted that its task would be far simpler if they did:

> [T]here is no general inherent conflict between federal pre-emption of state warning requirements and the continued validity of state common law damages actions. For example, in the Comprehensive Smokeless Tobacco Health Education Act of 1986, Congress expressly preempted State or local imposition of a 'statement relating to the use of smokeless tobacco products and health' but, at the same time, *preserved state law damages actions based on those products*. See 15 U.S.C. § 4406.

Id. at 2618 (emphasis added). Given the existence of such a savings clause in the Boat Safety Act, the Supreme Court's rationale in *Cipollone* actually *requires* a finding of no preemption here. Respondents' argument that *Cipollone* compels a contrary result is simply wrong.[4]

Respondents also argue that *Moore* must be wrong because the Boat Safety Act's savings clause (1) was only intended to "negate[ ] an affirmative defense of compliance with a government standard"; and (2) merely expresses "Congress' intent not to

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[4] In an attempt to bolster their interpretation of *Cipollone*, respondents argue that "the overwhelming majority of courts across the country have followed *Cipollone* and reached the same conclusion in interpreting the scope of express preemption clauses in numerous other federal health and safety statutes . . ." Opp. at 20. This argument is unavailing, since none of the cases cited by respondents involves claims under the Boat Safety Act -- a statute that has a narrow preemption provision *and* an extremely broad savings clause that expressly preserves all common law claims.

occupy the entire field of boat safety. . ." *Opp.* at 22-23. These alternative interpretations, however, make no sense. First, there was no reason for Congress to include a provision in the Safety Act for the sole purpose of "negat[ing] a[n] affirmative defense of compliance with a government standard." At the time the Boat Safety Act was enacted (and still today), it was already the law in every state that compliance with a federal regulation is *not* an absolute defense in an action for negligent failure to do more.[5] Since the law was already clear on this point, respondents' interpretation would render the savings clause a nullity.

It would have been equally senseless for Congress to include a provision in the Safety Act indicating its intent "not to occupy the entire field of boat safety." Opp. at 22. Under the Boat Safety Act, Congress merely authorized -- but did not require -- the Coast Guard to prescribe minimum safety standards regulating boat safety. There was no indication that Congress intended to *prohibit* all state regulation in the event that the Coast Guard failed to act -- *i.e.*, to occupy the entire field of boat safety. Moreover, respondents' interpretation cannot be squared with the preemption provision, which applies only when there is a "regulation prescribed under section 4302 of this title." 46 U.S.C. § 4306. Thus, the preemption provision is limited to situations where state and federal regulations *address the same matter*; it cannot be read to give rise to any broader "field" preemption of matters not regulated by the federal agency. Accordingly, there would be no reason for the savings clause to address, and affirmatively negate, the prospect of such broader field

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[5] *See* Restatement (Second) of Torts § 288C (1964). *See also* Paul Deuffert, *The Role of Regulatory Compliance in Tort Actions*, 26 Harv. J. on Legis. 175 (1989) ("[f]or a hundred years courts have considered axiomatic the common law principle that, against possible liability in tort, a defendant's compliance with government statutes and regulations is admissible only as evidence of the defendant's exercise of due care. Therefore, such compliance generally 'does not prevent a finding of negligence where a reasonable man would take additional precautions.'") (citing Restatement) (footnotes omitted).

preemption.

Finally, respondents argue that *Moore* was aberrational because it "relied on the traditional 'presumption against preemption [of] * * * state regulation of health and safety matters'" -- a presumption that, in respondents' view, is "entirely misplaced in the context of the Boat Safety Act." Opp. at 24. Once again, it is respondents' interpretation that is incorrect. This is a lawsuit seeking damages for personal injuries under state common law. This Court has repeatedly reaffirmed that such a suit is entitled to a "strong presumption against pre-emption" to protect states' rights to govern their own affairs. *Cipollone*, 112 S. Ct. at 2621. Respondents seek to jettison that presumption and, instead, create a strong presumption in *favor* of federal preemption arises simply by virtue of federal agency inaction. That approach should not be tolerated here.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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